STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B133

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE SOLE ISSUE OF ATTORNEY FEES

GEORGIA A. TOZER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT PAROLE SUPERVISION,

Respondent.

INTRODUCTION

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on July 28, 1998 to determine the appropriate amount of attorney fees due complainant pursuant to the May 26, 1998 Order of Remand of the State Personnel Board, which provides:

Given that a dispute of fact as to the appropriate amount of any award of attorney fees, the Board remands the matter to the administrative law judge on the sole issue of a determination of the appropriate amount of attorney fees.

Respondent was represented by Diane Marie Michaud, Assistant

Attorney General. Complainant was represented by Lawrence Katz, Attorney at Law.

Complainant received two earlier fee awards. At issue here is Complainant's Second Motion for Supplemental Award of Attorney Fees, with attached documentation, in which complainant moved for an award of \$2,070.00 for fees at the rate of \$100.00 per hour and costs comprised of a \$75.00 filling fee and \$16.90 for photocopies incurred via respondent's appeal to the Colorado Court of Appeals. The question is, were the requested fees and costs incurred and are they reasonable? C.R.S. § 24-50-125.5; C.R.S. § 13-17-102. Logic dictates that if the requested fee amount reflects work not performed or the billed hours are unduly excessive, the request is not reasonable. The burden of proof by preponderant evidence is borne by the party seeking attorney fees. Board of County Comm'rs v. Auslaender, 745 P.2d 999 (Colo. 1987); Little v. Fellman, 837 P.2d 197 (Colo. App. 1991).

Complainant withdrew her request for \$16.90 in copying costs and conceded that the one hour that was expended reviewing medical benefits in another matter is not compensable in this action. The total request, therefore, is \$1,970 in fees at the rate of \$100.00 per hour and \$75.00 for the appellate filing fee. Fees were not requested for counsel's appearance at the fee hearing.

At the July 28 hearing, there was no testimony from witnesses. Counsel argued their respective positions based upon the case

record. Since no sworn testimony was presented, there are no findings of fact as such. In that all attorneys are officers of the court, the statements of counsel are taken as having been made in good faith.

ISSUE

Whether the requested fees and costs were incurred and are reasonable.

DISCUSSION

A. Contentions

Respondent does not dispute that \$100.00 is a reasonable hourly rate or that complainant incurred attorney fees and is entitled to a fee award. It is respondent's position, rather, that complainant's brief to the Court of Appeals substantially duplicated her brief to the State Personnel Board and that she should not be awarded attorney fees again for work done on the initial brief.

In support of respondent's argument, counsel compared the two briefs, indicating those portions that she believed were substantially the same while pointing out differences and additions to the Court of Appeals brief. Respondent objects to awarding attorney fees for work that is duplicative, as well as for clerical work such as preparation of the table of contents and table of authorities.

Complainant, on the other hand, submits that the fee request

is not only reasonable, but is low when taking into account the actual number of hours worked in preparing the appellate brief. Noting that the Court of Appeals brief is nineteen pages in length compared to the twelve-page Board brief, complainant denies that there has been any duplicated billing. Counsel explained the expenditure of his time as being necessary for the review and analysis of respondent's opening brief, additional legal research and case review, re-writing, expanding and revising sections of the Board brief and adding new sections. Counsel indicated that the Court of Appeals relied on several cases that were not cited in the Board brief. Counsel noted, by way of example, that a one-page argument in the Board brief became nearly a three-page argument before the Court of Appeals. Five cases, three statutes and one regulation were added.

Counsel contends that a fee was billed only for revision and expansion of the original brief and overall review and analysis of the pertinent legal issues in the case, not for any work that had already been done. Counsel submits, in reply to respondent, that he spent four or five hours complying with the procedural requirements of the Court of Appeals, incorrectly characterized by respondent as "clerical work," but billed only 1.5 hours of his time, an amount he considered reasonable.

B. Analysis

The fee request has facial validity. There are significant differences between the two briefs. Complainant set forth a rational basis for the hourly charges.

Respondent challenges counsel's expenditure of time but does not propose a neutral standard for determining what the charges should be or what would be reasonable under the circumstances. The argument is simply that complainant's counsel took too long. The administrative law judge has no grounds, save personal opinion, for deciding that complainant's counsel spent too much time preparing the appellate brief. One attorney might have used less time and another might have taken more. It is not per se unreasonable to spend less than 20 hours writing a brief to the Colorado Court of Appeals. There is no factual basis for disputing either counsel's word or the documentation of the hours charged to his client.

Intangibles such as thinking and re-thinking are difficult to document yet are crucial to successful lawyering. This is not to say that there are no limits. Nevertheless, the record is without adequate support to suggest that complainant broached those limits in this case.

CONCLUSIONS OF LAW

The requested fees and costs were incurred and are reasonable.

ORDER

Respondent shall pay to complainant the sum of \$1,970 for attorney fees and \$75.00 for the Court of Appeals filing fee.

DATED this day of	
August, 1998, at	Robert W. Thompson, Jr.
Denver, Colorado.	Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of August, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE SOLE ISSUE OF ATTORNEY FEES in the United States mail, postage prepaid, addressed as follows:

Lawrence Katz

Attorney at Law

1100 Trinity Place

1801 Broadway

Denver, CO 80202

and in the interagency mail, addressed as follows:

Diane Marie Michaud

Assistant Attorney General

State Services Section

1525 Sherman Street, 5th Floor

Denver, CO 80203

7